



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Symtron Systems, Inc.

File: B-242244

Date: March 13, 1991

Kathleen C. Little, Esq., and Anne H. Warner, Esq., Howrey & Simon, for the protester.
Stephen M. Sorett, Esq., for AAI Corporation, an interested party.
Richard W. Freethey, Department of Transportation, for the agency.
Kathleen A. Gilhooly, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Whether a contract awardee is capable of complying with a commercial product requirement in the specifications involves the agency's affirmative determination of the awardee's responsibility, which generally is not reviewable by the General Accounting Office.

DECISION

Symtron Systems, Inc. protests the award of a contract to AAI Corporation under invitation for bids (IFB) No. DTCG42-90-B-QNL-078, issued by the United States Coast Guard for a propane fueled fire training simulator. Symtron contends that the fire training simulator offered by AAI is not a standard commercial manufactured product as required by the IFB.

We deny the protest.

The IFB's specifications required that:

"The system shall be essentially a standard commercial manufactured product differing only in respects to meet special requirements for the building layout. For purposes of this contract, a standard commercial product is one which has been sold by the manufacturer or his distributor in reasonable quantities to the general public or government in the course of conducting normal business operations. Nominal quantities such as

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models, samples, prototypes or experimental units will not be considered as meeting this requirement."

Symtron contends that AAI's system does not conform to the above solicitation requirement. Symtron alleges that AAI's system is still in the experimental stage, has never been manufactured on a production basis, and therefore is not a standard commercial manufactured product. Furthermore, Symtron asserts, AAI's system has been sold in only nominal, not reasonable, quantities.

The requirement here, for a standard commercial product, is not an element of the technical evaluation of a proposal, but merely a part of the general specifications for design and performance that each bidder is obligated to comply with in performing the contract. The requirement does not establish any precondition for award, but is for the contracting officer to consider in making his determination of responsibility. Walbar Inc., B-237228, Jan. 25, 1990, 90-1 CPD ¶ 108; W.H. Smith Hardware Co., B-228576, Feb. 4, 1988, 88-1 CPD ¶ 110.

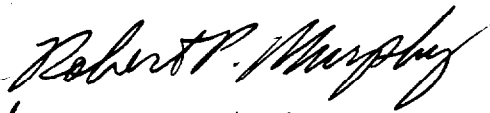
We generally will not review a contracting officer's affirmative responsibility determination absent a showing that it was made fraudulently, or in bad faith, or misapplied a definitive responsibility criterion. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(5) (1990). A definitive responsibility criterion is an objective standard established by the agency for a particular procurement for measuring the bidder's ability to perform the contract. This is to be contrasted with specification requirements, such as the provision in question here, that are encompassed within the contracting officer's subjective responsibility determination, and which are not subject to review by our Office, absent fraud or bad faith. Zero Mfg. Co.--Recon., B-224923.2, Oct. 28, 1986, 86-2 CPD ¶ 485.

The contracting officer determined that AAI was responsible after learning that AAI had been awarded contracts by the Navy Training Systems Center and Bucks County, Pennsylvania, for five fire training simulators. We see no basis to question the contracting officer's determination, since there is no evidence in the record of, nor has Symtron alleged, fraud or bad faith. See LSL Ind., Inc., B-237710, Mar. 6, 1990, 90-1 CPD ¶ 254.

Symtron argues that this is a matter of bid responsiveness rather than responsibility. While compliance with a commercial product requirement in advertised procurements was once considered to be a matter of bid responsiveness, see Coast Iron & Mach. Works, Inc., 57 Comp. Gen. 478 (1978), 78-1 CPD ¶ 394 (cited by the protester), it is now clearly

recognized to be encompassed within the contracting officer's responsibility determination. See Clausing Mach. Tools, B-216113, May 13, 1985, 85-1 CPD ¶ 533. The protester argues that our Office has continued to consider this a matter of bid responsiveness, citing Hicklin GM Power Co., B-222538, Aug. 5, 1986, 86-2 CPD ¶ 153. In Hicklin, however, the IFB expressly required bidders to demonstrate their compliance with a commercial product requirement in their bids, such that a bidder's failure to demonstrate compliance would render its bid nonresponsive. There was no similar requirement here.

The protest is denied.


for James F. Hinchman
General Counsel